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### Rule of law crisis in the member states of the EU

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# Rule of Law Crisis in the New Member States of the EU

## The Pitfalls of Overemphasising Enforcement

Working Paper No. 1 — July 2018

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# Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement

Dimitry Kochenov  
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## Abstract

The European Union and the Member States seem to be doing as little as they can against rule of law backsliding in some of the EU's constituent parts. Each of the EU institutions came up with their own plan on what to do, inventing more and more new soft law of questionable quality. All that is being done by the institutions seems to reveal one and only one point: there is a total disagreement among all the actors involved as to how to sort out the current impasse. This inaction helps the powers of the backsliding Member States to consolidate their assault on EU's values even further.

The core question is how to ensure that the EU's own rule of law be upheld. Authors argue that the most mature answer to the problems should necessarily involve not only the reform of the enforcement mechanisms, but the reform of the Union as such, as supranational law should be made more aware of the values it is obliged by the Treaties to respect and aspire to protect both at the national and also at the supranational levels. EU law should embrace the rule of law as an institutional ideal, which implies, *inter alia*, eventual substantive limitations on the *acquis* of the Union, as well as taking EU values to heart in the context of the day-to-day functioning of the Union, elevating them above the instrumentalism marking them today.

## Keywords

Rule of law, democracy, EU values, EU law, rule of law backsliding, constitutional capture

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## Introduction

The European Union (EU) and the Member States seem to be doing as little as they can to combat rule of law backsliding in some of the EU's constituent parts. Each of the EU institutions came up with their own plan on what to do, inventing more and more soft law of questionable quality. All that is being done by the institutions appears to reveal one and only one point: there is a total disagreement among all the actors involved as to how to sort out the current impasse. This inaction assists the powers of the backsliding Member States in consolidating their assault upon the EU's values even further. At least four key legal-political techniques are used to consolidate the undermining of the rule of law and democracy, as the present work shall demonstrate.

The core question is how to ensure the upholding of the EU's own rule of law. We argue that the most mature answer to the problems at hand necessarily requires a long-term perspective and involves, besides the reform of the enforcement mechanisms, also the reform of the Union as such. Supranational law should be made more aware of the values it is obliged by the Treaties to respect and protect, both at the national and supranational levels. EU law should embrace the rule of law as an institutional ideal, which implies, *inter alia*, eventual substantive limitations on the *acquis* of the Union, as well as taking EU values to heart in the context of the day-to-day functioning of the Union, elevating them above the instrumentalism marking them today.



Poland<sup>1</sup> has now joined Hungary,<sup>2</sup> doubling the number of the Member States where rule of law is not safeguarded. While more states could follow, the Union's position is, apparently, very weak: new soft law of questionable quality has been produced by each of the institutions,<sup>3</sup> while positive change is nowhere to be seen, notwithstanding even the belated activation of the Article 7(1) Treaty on European Union (hereinafter: TEU) mechanism.<sup>4</sup> Indeed, the situation seems to be evolving extremely fast and only in the direction of the deterioration of the rule of law and abuse by the executive of the independent institutions.<sup>5</sup> It seems that there is a total disagreement among essentially all the actors involved concerning what should be done, and the political will to sort out the current impasse is lacking at the level of the Member States, too. Supranational political party groups, instead of helping, seem to aggravate the situation.<sup>6</sup> This inaction helps the powers of the backsliding Member States consolidate their assault upon EU's values even further.

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<sup>1</sup> Most importantly: T.T. *Konieczny*, 'Of Institutions, Democracy, Constitutional Self-defence' (2016) 53 *Common Market Law Review* 1753. All websites were accessed on 20 July 2018; T.T. *Konieczny*, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 *Review of Central and East European Law* 116; W. *Sadurski*, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (2018) *Sydney Law School Research Paper No. 18/01*.

<sup>2</sup> K.L. *Scheppele*, 'Understanding Hungary's Constitutional Revolution', in A. von Bogdandy and P. *Sonnevend* (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing, 2015); Z. *Szente*, 'Challenging the Basic Values - The Problems with the Rule of Law in Hungary and the EU's Failure to Tackle Them', in A. *Jakab* and D. *Kochenov* (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017) 456; K.L. *Scheppele*, 'Constitutional Coups in EU Law', in M. *Adams*, A. *Meeuse* and E. *Hirsch Ballin* (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017).

<sup>3</sup> Council of the EU Press Release no. 16936/14, 3362nd Council meeting, General Affairs, [2014] 20-21; European Commission, 'A New EU Framework to Strengthen the Rule of Law' [2014] COM(2014)158; European Parliament, 'Report with Recommendations to the Commission on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights' [2016] (2015/2254(INL)). Cf. on all these instruments, D. *Kochenov*, A. *Magen* and L. *Pech* (eds), 'The Great Rule of Law Debate in the European Union' (2016 symposium), (2016) 54(5) *Journal of Common Market Studies*.

<sup>4</sup> K.L. *Scheppele* and L. *Pech*, 'Poland and the European Commission' (Parts I, II, and III), 3 January, 6 January, and 3 March 2017, available at <http://verfassungsblog.de/author/laurent-pech/>; D. *Kochenov* and L. *Pech*, 'Better Late Than Never? On the Commission's Rule of Law Framework and Its First Activation' (2016) 24 *Journal of Common Market Studies* 1062; P. *Oliver* and J. *Stefanelli*, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 24 *Journal of Common Market Studies* 1075; but see, E. *Hirsch Ballin*, 'Mutual Trust: The Virtue of Reciprocity - Strengthening the Acceptance of the Rule of Law through Peer Review', in C. *Closa* and D. *Kochenov* (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

<sup>5</sup> U. *Sedelmeier*, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession' (2014) 52 *Journal of Common Market Studies* 105; J.-W. *Müller*, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within the Member States' (2014) 165 *Revista de Estudios Políticos* 141; A. von Bogdandy and P. *Sonnevend* (eds), *Constitutional Crisis in the European Constitutional Area*, *op. cit.*; C. *Closa* and D. *Kochenov* (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); A. *Jakab* and D. *Kochenov* (eds), *The Enforcement of EU Law and Values: Methods to Achieve Compliance* (Oxford University Press, 2017); L. *Pech* and K.L. *Scheppele*, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

<sup>6</sup> R.D. *Kelemen*, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52 *Government and Opposition* 211.

A previously unimaginable situation arose whereby the EU harbours Member States which, besides obviously not qualifying for Union membership if they were to apply today, work hard to undermine key principles the EU was created to safeguard and promote: democracy, the rule of law, and the protection of fundamental rights.<sup>7</sup> The underlying issue is the creation of a *modus vivendi* where the EU's own instrumentalist understanding of the rule of law, including principles such as mutual trust or the autonomy of EU law, reinforces and not jeopardises respect for values enshrined in Article 2 TEU.<sup>8</sup>

The paper starts out by defining the problem, focusing on the nature, and gravity of rule of law backsliding in Hungary and Poland in order to outline four key techniques deployed by the autocratic regimes in order to consolidate the constitutional capture and massive assault on European values. These techniques to achieve, legitimise, and consolidate the destruction of the rule of law include: appeals to national sovereignty; fetishisation of 'constitutional identity' taken out of context; appeals to national security complete with the harassment of the media, NGOs, and independent educational institutions; and international disinformation campaigns (Part 1). We proceed by discussing the state of the art with regard to values in the EU legal system (Part 2); followed by undergoing a normative assessment of how these values should preferably be approached (Part 3). Looking at supranational law, we argue that the root of the problem is the lack of a sufficient upgrade of the role played by values - including the rule of law - when the Union transformed from an ordinary treaty organisation into a constitutional system (Part 4). The EU's powerlessness is among the root causes of letting Member States slide into authoritarianism (Part 5). We conclude by arguing for shifting the focus of the discussion from the enforcement of the rule of law to the reform of the Union as such as a long-term solution (Part 6). There is time: illiberal regimes seem to be there to stay, and the options in regard to changing this reality, either supranationally or from a grass-roots level, are limited, if not non-existent: we might need to wait ten years - or thirty, for that matter - before Hungary and Poland are back on track. In the meantime, EU institutions should come to a more subtle realisation of the EU's constitutional role and should not insist on the specificities of EU law trumping all other considerations, including respect for the values the EU and the Member States are supposed to share, but should instead acknowledge the possibility of potential limitations so as to let the foundations of the EU, as provided for by the Lisbon Treaty, evolve. This could definitely be done in the context of a soft quarantine of Poland, Hungary, and any other backsliding states.

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<sup>7</sup> As well as other values expressed in Art. 2 TEU; L. Pech, "A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 EU Constitutional Law Review 359; D. Kochenov, 'The *Acquis* and Its Principles: The Enforcement of the "Law" Versus the Enforcement of "Values" in the EU', in A. Jakab and D. Kochenov (ed), *The Enforcement of EU Law and Values*, *op. cit.*

<sup>8</sup> M. Klamert and D. Kochenov, 'Article 2', in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019).

## 1. The EU: From high expectations to jeopardy?

Whereas all Member States suffer from deficiencies in at least some elements of the rule of law, in light of a pattern of constitutional capture we focus on rule of law backsliders and follow the definition proposed by Pech and Scheppele, according to which rule of law backsliding is a ‘process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.’<sup>9</sup> In what follows we shall focus on the two Member States that presently satisfy these definitional elements, i.e. Hungary<sup>10</sup> and Poland.<sup>11</sup>

Even though countries acceding to the EU in 2004 had high hopes for joining the democratic world after the political changes, the enthusiasm for European values on the side of certain Central Eastern European Member States vanished on the way – a phenomenon which was unthinkable during the 1989 Eastern European ‘velvet revolutions’. In all these countries, the separation of powers had been realised where parliamentary lawmaking procedure required extensive consultation with both civil society and opposition parties and crucial issues of constitutional concern required a supermajority vote of the Parliament. Independent self-governing judicial power ensured that the laws were fairly applied. Constitutional scrutiny played a special role in transitional democracies.

After the regime change, Hungary was the first ‘post-communist’ country to join the Council of Europe and abide by the European Convention on Human Rights and Fundamental Freedoms (ECHR or Convention) in 1990. Poland gained membership in the Council of Europe in 1991 and became party to the ECHR in 1993. Hungary and Poland established official relations with the North Atlantic Treaty Organization (hereinafter: NATO) already in the early 1990s and became NATO members in 1999. They also started accession talks with the European Union Member States and signed the EU Association Agreements in the early 1990s, which paved the way for full EU membership.<sup>12</sup> The Treaty of Accession to the European Union was signed in 2003. Hungary, Poland, six other Central and Eastern European countries as well as two Mediterranean islands became members of the European Union on 1 May 2004 as part of the biggest enlargement in the Union’s history.<sup>13</sup> The European Union played an important role in the transformation of all the Eastern European states and in the context

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<sup>9</sup> L. Pech and K.L. Scheppele, ‘Illiberalism Within’, *op. cit.*, at 8.

<sup>10</sup> L. Sólyom, ‘The Rise and Decline of Constitutional Culture in Hungary’, in A. von Bogdandy and P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area*, *op. cit.*; M. Bánkuti, G. Halmai and K. L. Scheppele, ‘Hungary’s Illiberal Turn: Disabling the Constitution’ (2012) 23 *Journal of Democracy* 138.

<sup>11</sup> For an overview of political court-packing and other Polish developments, see, e.g., T. T. Konciewicz, ‘The Capture of the Polish Constitutional Tribunal and Beyond’, *op. cit.*; W. Sadurski, ‘How Democracy Dies (In Poland)’, *op. cit.* See also The Venice Commission for Democracy through Law, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, CDL-AD(2016)001, Venice, 11 March 2016, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29001-e>.

<sup>12</sup> K. Inglis, ‘The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation’ (2000) 37 *Common Market Law Review* 1173.

<sup>13</sup> A. Ott and K. Inglis (eds), *Handbook on European Enlargement* (T.M.C. Asser Press, 2002).



of their democratisation.<sup>14</sup> The principle of conditionality was used to achieve this, coupled with the presumption that any democratic or rule of law ‘backsliding’ would not be possible once the transformation was in place.<sup>15</sup> Alongside the Europe Agreements, the Union applied the Copenhagen criteria adopted by the 1993 Copenhagen European Council.<sup>16</sup> Clearly going beyond the scope of the Europe Agreements,<sup>17</sup> these criteria became the cornerstone of Hungary’s and Poland’s transformations throughout the first decade of this century, reshaping the core of EU constitutionalism in the process, too.<sup>18</sup> The shocking rate at which the deconstruction of the rule of law occurs in Poland and Hungary today demonstrates the importance of a constitutional culture beyond black letter law including constitutions, institutions, and procedures.

The shift came rather abruptly when, in April 2010, in a free and fair election the centre-right political parties Fidesz Hungarian Civic Union (Fidesz) and the Christian-Democratic People’s Party (in Hungarian: Kereszténydemokrata Néppárt, KDNP)<sup>19</sup> got 53% of the votes, which translated into more than two-thirds of the seats in the unicameral Hungarian Parliament under the election law then in force.<sup>20</sup> The ruling party did not tolerate any internal dissent, and after forming the second Fidesz government<sup>21</sup> it eliminated - at least in the domestic setting - all sources of criticism by both the voters and state institutions, effectively disposing of any effective checks and balances. Should a discontent electorate now wish to correct deficiencies, it would be difficult for it to do so due to the novel rules of the national ballot, which fundamentally bring into question the fairness of future elections. Judicial oversight and most importantly the Hungarian Constitutional Court’s room for correcting the failures of a majoritarian government have been considerably impaired, along the powers of other *fora* designed to serve as checks on government powers. Distortions of the media and lack of public information lead to the impossibility of a meaningful public debate and weaken the chances of restoring deliberative democracy. Support by the electorate is enhanced through emotionalism, revolutionary rhetoric, catchphrases such as ‘law and order’, ‘family’, ‘tradition’, ‘nation’, symbolic lawmaking, and identity politics in general. The friend/foe dichotomy is artificially created through punitive populism and scapegoating, partially through building on pre-existing prejudices,

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<sup>14</sup> Cf. M. A. Vachudova: *Europe Undivided* (Oxford University Press, 2005).

<sup>15</sup> D. Kochenov, *EU Enlargement and the Failure of Conditionality* (The Hague: Kluwer Law International, 2008).

<sup>16</sup> C. Hillion, ‘The Copenhagen Criteria and Their Progeny’, in C. Hillion (ed) *EU Enlargement: A Legal Approach* (Hart Publishing, 2004)

<sup>17</sup> P.-C. Müller-Graff: ‘Legal Framework for Relations between the European Union and Central and Eastern Europe: General Aspects’, in M. Maresceau (ed), *Enlarging the European Union: Relations between the EU and Central and Eastern Europe* (Longman, 1997) 42; M. Maresceau, ‘The EU Pre-Accession Strategies: A Political and Legal Analysis’, in M. Maresceau and E. Lanon (eds), *EU Enlargement and Mediterranean Strategies* (Palgrave, 2001).

<sup>18</sup> W. Sadurski, *Constitutionalism and Enlargement of Europe* (Oxford University Press, 2012).

<sup>19</sup> The cooperation between Fidesz and KDNP shall not be regarded as a coalition, rather as a party alliance created already before the elections. According to their self-perception their relation is similar to the party alliance between CDU and CSU in the Federal Republic of Germany. KDNP is a tiny party that would probably not get into Parliament on its own. The insignificance of KDNP allows us to abbreviate for the sake of brevity: whenever the term ‘Fidesz government’ is used, the Fidesz-KDNP political alliance is meant.

<sup>20</sup> Act C of 1997 on the Election Procedure.

<sup>21</sup> Fidesz first governed between 1998 and 2002.

and partially by creating new enemies such as multinational companies or persons challenging Hungarian unorthodoxy on the international scene.

The changes can be traced back to the government's ideological roots. But unlike in Poland, ideology by the government is chosen by way of political convenience. Turning towards illiberalism was a necessity, for a government wishing to retain political and economic power at all costs, and capture the state to this end, cannot reconcile its ideological stance with the concept of liberal democracy. So Fidesz had to search for other role models than the democratic world, and found its allies in countries such as Turkey, and most importantly Russia. Even though illiberalism was relabelled as 'Christian democracy' after Fidesz was re-elected in April 2018, the same form of governance remains. Representing harshly opposing views within a short period of time never hurt Fidesz politicians, who are brilliant at explaining their reasons for a volte-face. The party, originally with strong anti-Russian sentiments, became pro-Putin - and still managed to retain public support.

Poland followed the path of illiberalism when the Law and Justice party (Prawo i Sprawiedliwość, PiS) entered government in 2015. The country experienced a very serious departure from liberal democratic principles and is going through the reversal of the rule of law in various fields.

The tools employed and the outcome are very similar to the ones in Hungary, but certain elements of the Polish case also make it distinct, illustrating that there was no Central Eastern European or even Visegrád pattern. First, unlike in Hungary, the Polish government does not have a constitution-making nor -amending majority, therefore - for the time being - it engages in rule of law backsliding by way of curbing ordinary laws; as Ewa Łętowska put it, the government has been 'trying to change the system through the back door'.<sup>22</sup> Second, Hungary is essentially a kleptocracy,<sup>23</sup> where the government may pick any ideology available on the political spectrum to acquire and retain economic and political powers. By contrast, the Polish government and especially PiS leader Jarosław Kaczyński, the *de facto* ruler of Poland, are more likely to truly believe in what they are preaching in terms of national interests. When justifying rule of law backsliding, a whole new worldview is developed, rewriting the democratic transition and the post-1989 Polish history as something fundamentally corrupt and poised by foreign interest in contravention to national ones.<sup>24</sup> For him, post-1989 Polish history, including the roundtable talks in 1989, is the result of an

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<sup>22</sup> P. Pacula, Poland's 'July Coup' and What it Means for the Judiciary, 19 July 2017, available at: <http://euobserver.com/justice/138567>. Taking the President's announcement of a 2018 constitutional referendum into account, this might change in the future: L. Kelly, Polish President Wants Referendum on Constitution in Nov 2018, 24 May 2017, available at: <http://www.reuters.com/article/poland-politics-president-constitution-idUSL8N1IQ6P0>. For an immediate analysis see M. Matczak, Why the Announced Constitutional Referendum in Poland is not a Constitutional Referendum after all, 13 May 2017, available at: <http://verfassungsblog.de/why-the-announced-constitutional-referendum-in-poland-is-not-a-constitutional-referendum-after-all/>.

<sup>23</sup> Also referred to as a mafia state. See B. Magyar, Post-communist Mafia State: The Case of Hungary (CEU Press, 2016).

<sup>24</sup> J. Conelly, T.T. Konciewicz, Who are Today's Polish Traitors? Of Politics of Paranoia and Resentment and Missed Lessons from the Past, 15 November 2016, available at: <http://verfassungsblog.de/who-are-todays-polish-traitors-of-politics-of-paranoia-and-resentment-and-missed-lessons-from-the-past/>.

indecent compromise between the individuals and movements bringing about regime change and the outgoing Communist forces. Along these lines he sees all democratic institutions as a ‘sham’; for him, ‘the Third Republic is not a real state, but a phantom state built on the intellectual corruption of political elites, bribery, dysfunctional government caving Brussels and selling off Poland to strangers for peanuts.’<sup>25</sup> For PiS ‘repolonisation’ means taking over power, banks, land, and other property, and means reclaiming Poland from both foreigners and the corrupt political elites so as to bring about a true regime change.<sup>26</sup> Seemingly all means are allowed, and any checks or controls on power are seen as unnecessary burdens the state shall be freed from, so as to accomplish this purging exercise.

Illiberal governments are very well aware of the irreconcilability of their politics with European values. The states in question therefore lobby for exemptions.

#### **a. Invocation of national sovereignty to undermine the institutions**

A first technique is the invocation of national sovereignty without any further justification. Polish capture of the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, and ordinary courts happened under the pretext that ‘reform’ of the judiciary was a matter for the Member States and the EU acted *ultra vires* if it interfered. The Polish Constitutional Tribunal was the first institution to fall victim to state capture at the end of 2016.<sup>27</sup> Its powers have been considerably cut, changes were introduced to its structure and proceedings, budget cuts took place, and three justices elected constitutionally by the 7th Sejm (the lower chamber of the Polish Parliament) were not permitted to take oath, whereas three justices elected unconstitutionally by the 8th Sejm after PiS had won the elections were permitted to do so. After having rendered the Constitutional Tribunal irrelevant in upholding the rule of law, the government has done the same with the Supreme Court, the National Council for the Judiciary, and ordinary courts. The changes related to the reorganisation of the Supreme Court empower the executive to: prematurely end the tenure of judges, meaning forcefully retire them; determine the conditions and procedure for becoming a Supreme Court judge; control disciplinary procedures, amending the rules of procedure of the Supreme Court; change the total number of judges serving on the Supreme Court; reorganise the chambers in which Supreme Court justices are to serve; and restructure case allocation.<sup>28</sup> Ordinary court capture happened by subordinating all Presidents and Directors of courts, i.e. persons who decide on administrative and financial issues, to the Minister of Justice.<sup>29</sup> Even this short enumeration of government intrusions in

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<sup>25</sup> *Id.*

<sup>26</sup> Freedom House, *Pluralism under Attack: The Assault on Press Freedom in Poland*, available at: <https://freedomhouse.org/report/special-reports/assault-press-freedom-poland#sdendnote21anc>.

<sup>27</sup> T.T. *Koniewicz*, ‘Of Institutions, Democracy, Constitutional Self-Defence’ (2016) 53 *Common Market Law Review* 1753.

<sup>28</sup> In disregard of national and international criticism, on 8 December 2017, the laws on the Supreme Court and the Council were adopted by the Sejm, and on 15 December 2017 they were approved by the Senate.

<sup>29</sup> Ustawa z dnia 23 marca 2017 r. o zmianie ustawy - Prawo o ustroju sądów powszechnych [Law amending the act on the organization of common courts system], OJ 2017, item 803, available at: <http://www.dziennikustaw.gov.pl/DU/2017/803> (in Polish).

to the powers of the courts which highlights only some of the milestones in judicial capture shows, in the words of the Venice Commission – the most authoritative body in Europe on the issues of the rule of law and judicial independence – that ‘the constitutionality of Polish laws can no longer be guaranteed’.<sup>30</sup> Another example from the same jurisdiction is the dispute related to the felling of trees in the Białowieża Forest, a UNESCO World Heritage Site. In *Białowieża*, pending the judgment in the main proceedings, the Court of Justice ordered Poland to stop the forest management operations.<sup>31</sup> The Polish response was an intensified logging of trees, and Poland even asked for removing the forest in question from the UNESCO World Heritage List.<sup>32</sup> Reference to national sovereignty often comes without any further justification. As the above controversy shows, by questioning the powers of the EU the Polish government does not aim to initiate a legitimate discussion about the delineation between national and EU powers. It much rather wishes ‘to break free from the supranational machinery of control and enforcement. Following the trajectory from the “exit in values” to the “exit in legality” reveals an inescapable logic. All institutions, domestic and supranational, are seen to be standing in the way, and their rejection is part of the comprehensive constitutional doctrine – the politics of resentment.’<sup>33</sup>

#### **b. Appeals to constitutional identity to undermine the institutions**

The second and more sophisticated technique is the attempt to package departures from the rule of law in the name of constitutional identity.<sup>34</sup> Back in 2017, the Hungarian Parliament failed to acquire the necessary quorum to constitutionally entrench the concept of constitutional identity, but after the Fidesz and its tiny coalition partner the Christian Democratic People's Party acquired a two thirds i.e. constitution amending majority, a modification to Article R) of the Fundamental Law referring to ‘Hungarian cultural and Christian identity’ has again been tabled. But the amendment is somewhat redundant, since the already captured Hungarian Constitutional Court (hereinafter: HCC) came to rescue the government, and developed its own theory of constitutional identity after the failed attempt to embed the concept into the Fundamental Law. When delivering its abstract constitutional interpretation in relation to European Council decision 2015/1601 of 22 September 2015 establishing provisional measures benefitting Italy and Greece, to support them in better coping with an emergency situation characterised by a sudden inflow of nationals of third countries in those Member States, the HCC invoked constitutional identity.<sup>35</sup> However tautological this may sound, according to the HCC ‘constitutional identity equals the

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<sup>30</sup> European Commission, ‘Recommendation of 26.7.2017 regarding the rule of law in Poland’ [2017] C(2017)5320, para. 10.

<sup>31</sup> Case C-441/17R *Commission v Poland* [2017] ECLI:EU:C:2017:877.

<sup>32</sup> In Case C-441/17 *Commission v Poland* [2018] ECLI:EU:C:2018:255, of 18 April 2018, the Court ruled that by carrying on with the logging in the Białowieża Forest, Poland failed to fulfil its obligations under EU law.

<sup>33</sup> T.T. Konciewicz, The *Białowieża* case. A Tragedy in Six Acts, *Verfassungsblog*, 17 May 2018, available at: <https://verfassungsblog.de/the-bialowieza-case-a-tragedy-in-six-acts/>.

<sup>34</sup> G. Halmai, ‘Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law’ (2018) 43 *Review of Central and East European Law* 1, 23-42.

<sup>35</sup> 22/2016 (XII. 5.) HCC decision.

constitutional (self-)identity of Hungary’.<sup>36</sup> Its content is to be determined by the HCC on a case-by-case basis based on the interpretation of the Fundamental Law, its purposes, the National Avowal contained therein, and the achievements of the Hungarian historical constitution. This definition is so vague that it can be considered as an attempt of granting a *carte blanche* type of derogation to the executive and the legislative from Hungary’s obligations under EU law.<sup>37</sup> Once Fidesz acquired a two thirds majority again in the 2018 parliamentary elections, it finally incorporated the constitutional identity to the Fundamental Law by way of the so-called seventh constitutional amendment.<sup>38</sup> Questioning claims of constitutional identity might well be criticised by those concerned as being ignorant or lacking respect, but European supervisory mechanisms should be well-suited and confident enough to tell the bluff apart from genuine claims of constitutional identity.<sup>39</sup>

### c. Invocation of national security to undermine the institutions

The third technique is reference to national security. Labelling virtually anyone still capable of formulating dissent as foreign agents is a technique long used, but in Hungary it was taken to a whole new level in 2017 with the adoption of Lex CEU and Lex NGO,<sup>40</sup> targeting a private university and foreign-funded civil society organisations that are independent of government funds and thereby fit to express government criticism. The explanations of the laws attempting to force CEU out of the country and to limit public space for NGOs respectively attempt to delegitimise these entities by claiming they pose national security threats to the country. The phenomenon of a shrinking space for civil society can be traced in both Hungary and Poland. The narrative surrounding NGOs got very hostile. We are witnessing orchestrated smear campaigns against civil society members that are criticising the government or simply not fitting its ideological agenda.<sup>41</sup> In some cases, the smear campaigns are followed by

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<sup>36</sup> *Id.*

<sup>37</sup> For English language analyses see G. Halmai, The Hungarian Constitutional Court and Constitutional Identity, 10 January 2017, available at: <http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>.

<sup>38</sup> See inserted Article R) Fundamental Law. The official government position is available at: <http://www.kormany.hu/en/ministry-of-justice/news/the-chief-goal-of-the-seventh-amendment-to-the-constitution-is-the-protection-of-national-sovereignty>.

<sup>39</sup> R.D. Kelemen, ‘The Dangers of Constitutional Pluralism’, in M. Avbelj and G. Davies (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar, 2018); V. Perju, ‘On Uses and Misuses of Human Rights in European Constitutionalism’, in S. Vöneky and G. L. Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World in Disorder* (Cambridge University Press, 2018); G. Halmai, *Abuse of Constitutional Identity*, *op. cit.*

<sup>40</sup> Act XXV of 2017 on the Modifications of Act CCIV of 2011 on National Higher Education and Act LXXVI of 2017 on the transparency of foreign-funded organisations. According to the law on NGOs, any association or foundation receiving foreign support above the amount of 23.200 EUR per year will have to notify the courts about this fact. EU money is exempted, but only if distributed by the Hungarian state through a budgetary institution. The respective organisation will be labelled as a so-called ‘organization supported from abroad’, which will need to be indicated at the entity’s website, press releases, publications, etc. The law is disturbing in many aspects: it mimics Russian worst practices, which have been condemned by international organisations as violations of freedom of association and free speech.

<sup>41</sup> Associated Press in Warsaw, Police Raid Offices of Women's Groups in Poland After Protests, 5 October 2017, available at: <https://www.theguardian.com/world/2017/oct/05/police-raid-offices-of-womens-groups-in-poland>.



investigations undertaken by law enforcement or tax authorities, which may create an even more hostile environment for NGOs.<sup>42</sup> Governments deprive civil society of effective functioning by limiting their access to funding, including state but also foreign funding, as the Hungarian law obliges NGOs to indicate that they are ‘organisations receiving support from abroad’, and to display this stigmatising label on all their materials published.<sup>43</sup> This is getting very close to demonising dissenters as terrorists and indeed the government claims that NGOs receiving foreign support - i.e. the most professional ones - are helping asylum seekers, and among them terrorists, enter the country. A modification of the Hungarian Criminal Code ensures that criminal sanctions can be imposed on NGOs and individuals that provide legal or other types of aid to migrants arriving at to the Hungarian borders.<sup>44</sup> National security claims might not only fit into the ruling party’s nationalistic, exclusionary rhetoric and scapegoating, but it can serve (i.e. be abused) as the basis for lobbying for exemptions from European standards. As Uitz points out, reference to national security, which is the sole responsibility of the Member States according to Article 4(2) TEU ‘can be a much stronger centrifugal force in Europe than cries of constitutional identity could ever be. [...] Therefore, it is all the more important that European constitutional and political actors realize: The carefully crafted new Hungarian laws use the cloak of national security to stab the rule of law, as understood in Europe, in the heart.’<sup>45</sup>

#### **d. Disinformation campaigns at the service of the backsliding regimes**

The fourth technique the autocrats use to undermine the rule of law is disinformation or misinterpretation of the laws and policies of the government. Again Hungary took the lead in 2011 when they sent a wrong translation to Brussels of their controversial new Constitution, the Fundamental Law, which looked more in conformity with EU laws and

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<sup>42</sup> Hungarian Helsinki Committee et al., ‘Timeline of Governmental Attacks Against Hungarian NGO Sphere’, 7 April 2017, available at: [https://tasz.hu/files/tasz/imce/timeline\\_of\\_gov\\_attacks\\_against\\_hu\\_ngos\\_07042017.pdf](https://tasz.hu/files/tasz/imce/timeline_of_gov_attacks_against_hu_ngos_07042017.pdf).

<sup>43</sup> For more details see M. Szuleka, ‘First Victims or Last Guardians? The Consequences of Rule of Law Backsliding for NGOs: Case Studies of Hungary and Poland’ (2018) CEPS Paper in Liberty and Security No. 2018-06.

<sup>44</sup> Article 353/ of Act C of 2012 on the Hungarian Criminal Code. For the official government position see: Website of the Hungarian Government, Strong Action is Required Against the Organisers of Migration, 24 May 2018, available at: <http://www.kormany.hu/en/news/strong-action-is-required-against-the-organisers-of-migration>.

<sup>45</sup> R. Uitz, The Return of the Sovereign: A Look at the Rule of Law in Hungary - and in Europe, 5 April 2017, available at: <http://verfassungsblog.de/the-return-of-the-sovereign-a-look-at-the-rule-of-law-in-hungary-and-in-europe/>.

values than the actual text.<sup>46</sup> From a more substantive view, the Polish<sup>47</sup> and Hungarian<sup>48</sup> responses to the Commission<sup>49</sup> and the European Parliament<sup>50</sup> invitation for a Council Decision on the determination of a clear risk of a serious breach by Poland and Hungary of values enshrined in Article 2 TEU also contain factual mistakes and deliberate deceit.<sup>51</sup> Up-to-date information following the fast legislative changes that sometimes happen literally overnight and solid legal research may deconstruct the fake information these texts contain and challenge the contention that these political forces engage in a dialogue, when all they do is produce documents or make some cosmetic changes in order to gain time and press on with their illiberal agenda.

Such ‘anti-Member States’ that abuse the law and Constitution to create autocracies take full part in governing the Union, benefit from unprecedented direct financial support, and abuse the international prestige which is associated with the membership of this organisation.<sup>52</sup> Poland will have received 86 billion euros under the current budgetary framework by 2020 and Hungary 24 billion, which is an unprecedented transfer of resources from democracies to illiberal regimes, which unquestionably contributes to the entrenchment of the regimes in power.

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<sup>46</sup> For a detailed enumeration of the discrepancies see a joint document by the Hungarian Helsinki Committee, the Eötvös Károly Policy Institute, and the Hungarian Civil Liberties Union, Full List of Mistakes and Omissions of the English Version of the Hungarian Draft-Constitution, available at: [https://tasz.hu/files/tasz/imce/list\\_of\\_all\\_the\\_omissions\\_and\\_mistranslations.pdf](https://tasz.hu/files/tasz/imce/list_of_all_the_omissions_and_mistranslations.pdf). This technique is also employed the other way round: when the Venice Commission delivered its highly critical opinion of the Fundamental Law, it was interpreted by the Government, as if the Hungarian constitution was being praised. See, The Hungarian Helsinki Committee, NGOs Analyze Government Reactions Concerning the Venice Commission’s Opinion on the New Constitution of Hungary, 18 July 2011, available at: <https://www.helsinki.hu/en/ngos-analyze-government-reactions-concerning-the-venice-commissions-opinion-on-the-new-constitution-of-hungary/>.

<sup>47</sup> See: Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary, 7 March 2018, available at: [https://www.premier.gov.pl/files/files/white\\_paper\\_en\\_full.pdf](https://www.premier.gov.pl/files/files/white_paper_en_full.pdf).

<sup>48</sup> See, as made public by MEP Ujhelyi, ‘Information Sheet of the Hungarian Government on the Issues Raised by the Draft Report of Judith Sargentini on ‘A Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded’, 2018, available at <http://ujhelyi.eu/wp-content/uploads/2018/05/Information-sheet-of-the-Hungarian-Government-on-the-issues-raised-by-th....pdf>.

<sup>49</sup> European Commission, ‘Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law’ [2017] COM(2017) 835 final.

<sup>50</sup> Committee on Civil Liberties, Justice and Home Affairs, ‘Draft report on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded [2017] (2017/2131(INL)), Rapporteur: Judith Sargentini).

<sup>51</sup> For an assessment of the Polish White Paper by the Polish Judges Association ‘Iustitia’, together with a team of experts, see, Response to the White Paper Compendium on the Reforms of the Polish Justice System, Presented by the Government of the Republic of Poland to the European Commission, 2018, available at: <http://www.statewatch.org/news/2018/mar/pl-judges-association-response-judiciary-reform-3-18.pdf>. For an assessment of the Hungarian information sheet see the lengthy criticism by R. Labanino and Z. Nagy, The Social and Political Situation in Hungary, 17 May 2018 available at: [https://drive.google.com/file/d/1OcllFUt9s1-FLMRo\\_qF4MbywRxAAbt5/view](https://drive.google.com/file/d/1OcllFUt9s1-FLMRo_qF4MbywRxAAbt5/view).

<sup>52</sup> C. Closa, ‘Reinforcing EU Monitoring of the Rule of Law’, in C. Closa and D. Kochenov (eds), Reinforcing the Rule of Law Oversight in the European Union (Cambridge University Press, 2016), 13.

The international reactions to the current situation underline one thing: the Union is either content with the current situation or entirely powerless. The former is hardly convincing given both the size of direct economic transfers to Hungary and Poland as well as the dangers that these Member States bring into the Union, as fully expressed in the numerous public statements of the members of the College of Commissioners and heard during European Parliament debates. If a Member State breaches the EU's fundamental values, this is likely to undermine the very foundations of the Union and the trust between its Member States, regardless of the field in which the breach occurs.<sup>53</sup> Beyond harming the nationals of a Member State, Union citizens residing in that state will also be detrimentally affected. Moreover, the lack of limitations on 'illiberal practices'<sup>54</sup> may encourage other Member States' governments to follow suit and subject other countries' citizens to an abuse of their rights. In other words, violations of the rule of law may, if there are no consequences, become contagious.<sup>55</sup> Finally, all EU citizens will to some extent suffer due to the given state's participation in the EU's decision-making mechanisms. At the very least, the legitimacy of the Union's decision-making process will be jeopardised. Therefore, the latter explanation, i.e. the EU's powerlessness, seems to be the core of the matter. Such powerlessness is a consequence of a combination of the real difficulties, conceptual as well as practical, related to the enforcement of EU values,<sup>56</sup> but also, equally importantly, to the systematic misrepresentation of the Union's capacity by the Member States and the institutions unwilling to act, as a clear consensus on forceful dealing with the rule of law backsliding is apparently lacking.

The claims that little to nothing can be done under the current legal framework - which are heard with remarkable regularity, confirming the second supposition above - are entirely baseless, as Hillion, Besselink, and other scholars have consistently pointed out.<sup>57</sup> In making such claims, the Commission and other institutions point to the fact that this powerlessness is not caused by an absolute lack of Treaty instruments that would warrant intervention. Rather, the instruments that are available are apparently considered *too strong*, or, to put it differently, too toxic, to be used. Among possible instruments, the EU's 'nuclear' option stands out, we are told: Article 7 TEU could not be activated for a long time in fear that the fallout would have been too terrible and because the hurdles for starting the procedure were allegedly too insurmountable. Such justifications for inaction or engaging in substitute

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<sup>53</sup> European Commission Communication, 'On Article 7 of the Treaty on European Union - Respect for and Promotion of the Values on which the Union is Based' [2003] COM(2003)606 final, p. 5.

<sup>54</sup> The term 'illiberal democracy' was coined long ago, but it gained practical relevance in the EU after Hungarian Prime Minister praised the concept in his speech given in Tusnádfürdő on 25 July 2014. Cf. Frans Timmermans' speech to the European Parliament: 'There is no such thing as an illiberal democracy'. F. Timmermans, EU Framework for Democracy, Rule of Law and Fundamental Rights, Strasbourg, Speech/15/4402, 12 February 2015, available at: [http://europa.eu/rapid/press-release\\_SPEECH-15-4402\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-4402_en.htm).

<sup>55</sup> S.a., Politico, Viktor Orbán: The Conservative Subversive, Politico 28, 2015, 12-15, 15.

<sup>56</sup> Cf. G. Itzcovich, 'On the Legal Enforcement of Values. The Importance of the Institutional Context', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values*, *op. cit.*; M. Avbelj, 'Pluralism and Systemic Defiance in the EU', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values*, *op. cit.*

<sup>57</sup> C. Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means', in C. Closa and D. Kochenov (eds), *Reinforcing the Rule of Law Oversight*, *op. cit.*; L. Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values*, *op. cit.*

activity, like the invention of the new soft-law procedures, are difficult to reconcile with the radical deterioration of constitutionalism on the ground in the backsliding states.<sup>58</sup> Now that the Article 7(1) TEU procedure has been triggered against Poland,<sup>59</sup> and there are serious attempts to have it initiated against Hungary,<sup>60</sup> the opposite preoccupation comes to the fore, namely the inefficiency of the tool,<sup>61</sup> which leads to the reinvention of other tools in place. For instance, Article 258 TFEU or 259 TFEU has been given a broader appeal in the backsliding context,<sup>62</sup> as evidenced by the infringement proceedings pursued against Poland in the context of its destruction of the Supreme Court, which build on the newly-found *effet utile* and EU law scope-shaping significance of Article 19(1) TEU (as well as Article 47 CFR, read in conjunction with the former),<sup>63</sup> in opposition to the Pyrrhic victories in the otherwise similar Hungarian context.<sup>64</sup> Scholars expected this development,<sup>65</sup> which infuses Article 258 TFEU with clear new potential, all the necessary caution in interpreting it too broadly notwithstanding.

Some, like Vice President Timmermans, compare the present situation to that of the Austrian crisis at the turn of the millennium and fear that triggering Article 7 would similarly backfire.<sup>66</sup> The parallel drawn between the Austrian and current situations is misleading, however, for numerous reasons. The most obvious point is that the institutions could not have made use of the then non-existent preventive arm of Article 7 - currently Article 7(1) TEU - at the time the Freiheitliche Partei Österreichs (FPÖ) entered government, and there was no reason to make use of the provision as it then stood, i.e. to invoke the sanctioning arm.<sup>67</sup> Given the lack of a legally pre-defined preventive procedure, a political action was opted for that need not - but, very importantly, *could* - be taken vis-à-vis Hungary or Poland in light of Article 7. The political quarantine vis-à-vis Austria started right after the formation of the government, before those in power could have eroded European values,

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<sup>58</sup> D. Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (2017) EUI Working Paper LAW 2017/10.

<sup>59</sup> European Commission, 'Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland - Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law' [2017] (COM(2017) 835 final).

<sup>60</sup> Committee on Civil Liberties, Justice and Home Affairs, (2017/2131 (INL)), *op. cit.*

<sup>61</sup> As a consequence, the institutions see the solution in the power of the purse to provide disincentives for rule of law violations. See European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States' [2018] COM(2018)324 final.

<sup>62</sup> K. L. Scheppele, 'The Case for Systemic Infringement Actions', in Clossa and Kochenov (eds), *Reinforcing Rule of Law*, *op. cit.*; D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool' (2015) 7 *The Hague Journal of the Rule of Law*, 153.

<sup>63</sup> Case C-64/16 *Associação sindical dos juizes portugueses* [2018] ECLI:EU:C:2018:117; M. Krajewski, '*Associação sindical dos juizes portugueses*: The Court of Justice and Athena's Dilemma' (2018) 3 *European Papers* 295.

<sup>64</sup> Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687 (compulsory retirement of judges). U. Belavusau, 'Case C-286/12 *Commission v. Hungary*' (2013) 50 *Common Market Law Review* 1145.

<sup>65</sup> C. Hillion, 'Overseeing the Rule of Law in the EU' *op. cit.*

<sup>66</sup> F. Timmermans, *The European Union and the Rule of Law - Keynote Speech at Conference on the Rule of Law*, Tilburg University, 31 August 2015, available at: [https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en).

<sup>67</sup> K. Lachmayer, 'Questioning the Basic Values - Austria and Jörg Haider', in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values*, *op. cit.*

and once the situation was thoroughly investigated, the Three Wise Men commissioned with this task did not find a violation of EU values, and accordingly suggested lifting the political sanctions.<sup>68</sup> EU Member States' hostile intervention against Austria was not backed by either a proper legal basis or political necessity: an illegal ad hoc action triggered by a democratic election result. The current Hungarian and Polish situations cannot be compared to the former Austrian one, since the former are long in the state of constitutional capture, which is well documented both by European institutions and in the academic literature.

## 2. The place of values in the system of EU law

Article 2 TEU, which makes reference to democracy, the rule of law, and a series of other (interrelated) values of the Union, is somewhat different in nature from the rest of the *acquis*. The same unquestionably applies to the violations of values: Article 2 TEU violations are not the same as ordinary *acquis* violations. Such differences are particularly acute in the context of one specific type of chronically non-compliant states, where, like in Hungary, non-compliance is *ideological* and cannot be explained by reference to the lacking capacity, 'simple' corruption, and outright sloppiness<sup>69</sup> - arguments one might deploy in the context of some South-East European countries.<sup>70</sup> Where chronic non-compliance is ideological, Article 260 TFEU becomes the *crux* of the whole story, as simple restatements of the breach under Article 258 TFEU (or Article 259 TFEU, for that matter)<sup>71</sup> will presumably not be enough,<sup>72</sup> even if the recent innovations mentioned in the previous section would probably allow for hope even in the context of the most cautious reading of the potential of these provisions.<sup>73</sup> The question of the effectiveness of the ideological choice favouring non-compliance made by the relevant Member States will remain open for the years to come, as the Court in consort with other institutions is in search of a more effective means of deploying the current instruments in the context of rule of law backsliding.

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<sup>68</sup> M. Ahtisaari, J. Frowein and M. Oreja, 'Report on the Austrian Government's Commitment to the Common European Values, in Particular Concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of the FPÖ' (2001) 40 *International Legal Materials: Current Documents* 1, 102-123, (The Wise Men Report).

<sup>69</sup> R. Uitz, 'Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 *International Journal of Constitutional Law* 279.

<sup>70</sup> E.g. M. Ioannidis, 'The Greek Case', in Jakab and Kochenov (eds), *The Enforcement of EU Law*, *op. cit.*

<sup>71</sup> See e.g., D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool' (2015) 7 *The Hague Journal of the Rule of Law* 153.

<sup>72</sup> On the main deficiencies of the system, see, most importantly, B. Jack, 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?' (2013) 19 *European Law Journal*, 19 (2013) 420; P. Wennerås, 'Sanctions Against Member States under Article 260 TFEU: Alive, but not Kicking?' (2012) 49 *Common Market Law Review* 145; P. Wennerås, 'Making Effective Use of Article 260 TFEU', in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values*, *op. cit.*

<sup>73</sup> E.g. L.W. Gormley, 'Infringement Proceedings', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017).



While the literature has focused on restating the EU's presumed rule of law nature,<sup>74</sup> as well as the issue of the enforcement of EU rule of law and other values in the defiant Member States,<sup>75</sup> it is crucial to realise that Europe's structural constitutional vulnerability stretches far beyond enforcement issues *per se*. Instead, it is rooted in the discrepancies between the EU's proclaimed constitutional structure as we find it in the Treaties and the reality marking the development of EU integration, as outlined above, fostering doubt as to whether the Union is actually abiding by the rule of law.<sup>76</sup> In the light of this structural deficiency, one can argue that the much-analysed systemic deficiency<sup>77</sup> in the area of values and especially the rule of law was bound to emerge sooner or later, whether in Hungary, Poland or elsewhere, as the Union matured.<sup>78</sup> Dealing with it will necessarily require moving beyond preoccupation with enforcement, which has engulfed all the recent literature on the subject - quite understandably, given the astonishing speed of the constitutional deterioration in both Hungary and Poland - and reforming the integration project at the core,<sup>79</sup> ensuring that democracy and the rule of law are endowed with a more important role to play in the context of the supranational law of the Union.

In this general context where the *acquis* and values are not synonymous, the application of the Copenhagen criteria in the context of the recent enlargement rounds particularly teaches a lesson of caution: the Commission has emerged as an institution that, when given all the responsibility regarding the preparedness of the new Member States for accession (values compliance outside the scope of the *acquis* included) failed the exercise.<sup>80</sup> Here, to the void of substance the lack of the capability to generate such a substance was also added, the lack of virtually any limitations emerging from the scope of the law notwithstanding. Besides illustrating the EU's built-in limitations with regard to its ability to generate the substance of Article 2 TEU rules, the pre-accession context also sounds the alarm bell on institutional capacity: the Commission is probably not the best actor to entrust with the internal monitoring of Member States' compliance with Article 2 TEU.

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<sup>74</sup> M. L. Fernández Esteban, *The Rule of Law in the European Constitution* (The Hague: Kluwer Law International, 1999); L. Pech, 'The Rule of Law as a Constitutional Principle'; W. Schröder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Oxford: Hart Publishing, 2016).

<sup>75</sup> E.g., the contributions in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law*, *op. cit.*; A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values*, *op. cit.*; A. von Bogdandy and P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area* (C.H. Beck, Hart, Nomos, 2015); J.-W. Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order' (2013) Transatlantic Academy Working Paper No. 3.

<sup>76</sup> G. Palombella, 'The Rule of Law and its Core', in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009); G. Palombella, 'Beyond Legality - Before Democracy: Rule of Law Caveats in a Two-Level System', in Closa and Kochenov (eds), *Reinforcing Rule of Law*, *op. cit.*; D. Kochenov, 'EU Law Without the Rule of Law. Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law*.

<sup>77</sup> A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, What Has Been Done, What Can Be Done' (2014) 51 *Common Market Law Review* 59.

<sup>78</sup> See, for a broad discussion, D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2015).

<sup>79</sup> For a much more critical restatement of this particular argument, see, D. Kochenov, 'Is There EU Rule of Law?', in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law*, *op. cit.*; J.H.H. Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law', in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law*, *op. cit.*

<sup>80</sup> D. Kochenov, *EU Enlargement and the Failure of Conditionality*, *op. cit.*

### 3. How to approach the rule of law in the current context?

The essence of the rule of law, distinguishing it from legality, democracy, and other wonderful things, is that the law is constantly in tension with and controlled by law - how the EU is falling short of such institutional ideal will be demonstrated. Palombella's rule of law, which is *dialogical* in essence since it presupposes and constantly relies upon a constant taming of law with law, 'amounts to preventing one dominant source of law and its unconstrained whim, from absorbing all the available normativity'.<sup>81</sup> On this count the rule of law implies that the law - *gubernaculum* - should always be controlled by law - *jurisdictio* - lying outwith the sovereign's reach.<sup>82</sup> The tension is necessarily dialogical in nature since the absolute domination of either *gubernaculum* or *jurisdictio* necessarily destroys the core of the rule of law, which is the tension between the two. It goes without saying that making use of such a definition should necessarily be qualified by the wise words of Krygier: 'whatever one might propose as the *echt* meaning of the rule of law is precisely that: a proposal'.<sup>83</sup> The rule of law is a classic example of an essentially contested concept:<sup>84</sup> the EU is seemingly as hopeless at defining what it means as its Member States and the broad academic doctrine.<sup>85</sup> The debate is constantly ongoing,<sup>86</sup> but the last available definition,<sup>87</sup> inspired by the Venice Commission's guidelines,<sup>88</sup> could provide a solid illustration of the current state of the definitional debate. Whether one agrees with the Commission's approach or not, it seems to be beyond any doubt what the rule of law is not. It is not democracy, the protection of human rights, nor similar wonderful things, each of them

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<sup>81</sup> G. Palombella, 'The Principled, and Winding, Road to Al-Dulimi. Interpreting the Interpreters' (2014) 1 Questions of International Law 17, 18. Similarly, see, D. Georgiev, 'Politics of Rule of Law: Deconstruction and Legitimacy in International Law' (1993) 4 EJIL 1, 4.

<sup>82</sup> For an analysis of this perspective, see, id.; G. Palombella, *È possibile la legalità globale?* (Bologna: Il Mulino, 2012); G. Palombella, 'The Rule of Law and its Core', in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009) 17. See also, G. Palombella, 'Beyond Legality - Before Democracy, *op. cit.*

<sup>83</sup> M. Krygier, 'Inside the Rule of Law' (2014) 3 *Rivista di filosofia del diritto* 77, at 78.

<sup>84</sup> For a brilliant outline of the history of contestation, see, J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 127.

<sup>85</sup> For a multi-disciplinary overview see e.g., G.K. Hadfield and B. R. Weingast, 'Microfoundations of the Rule of Law' (2014) 17 *Annual Review of Political Science* 21; L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper No. 04/09 (NYU Law School), and the literature cited therein. See also L. Pech, 'Promoting the Rule of Law Abroad', *op. cit.*, on the 'holistic understanding' of the rule of law. For a special 'Eastern-European' perspective, which is particularly important in the context of the on-going developments in the EU, see, J. Přibáň, 'From "Which Rule of Law?" to "The Rule of Which Law?": Post-Communist Experiences of European Legal Integration' (2009) 1 *The Hague Journal on the Rule of Law* 337.

<sup>86</sup> For key contributions, see, W. Schröder (2015), *op. cit.*; L. Morlino and G. Palombella (eds), *Rule of Law and Democracy* (Boston: Brill, 2010); G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009).

<sup>87</sup> Commission, 'A New EU Framework to Strengthen the Rule of Law' COM (2014) 158.

<sup>88</sup> Venice Commission Document CDL-AD(2016)007-e 'Rule of Law Checklist' (adopted in 106<sup>th</sup> Plenary Session, Venice, 11-12 March 2016), as well as in the earlier version thereof: Venice Commission Document CDL-AD(2011)003rev-e 'Report on the Rule of Law' (adopted in 86<sup>th</sup> Plenary Session, Venice, 25-26 March 2011).

definitely boasting its own sound claim to existence as a notion independent from the rule of law.<sup>89</sup> And it is not mere legality, which is adherence to the law.

Once the rule of law and legality are distinguished, the basic meaning of the rule of law comes down to the idea of the subordination of the law to another kind of law, which is not up to the sovereign to change at will.<sup>90</sup> This idea, traceable back to mediaeval England,<sup>91</sup> is described with recourse to two key notions in order to reflect the fundamental duality of the law's fabric, indispensable for the operation of the rule of law as a principle of law:<sup>92</sup> *jurisdictio* - the law untouchable for the day-to-day rules running the legal system and removed from the ambit of the purview of the sovereign - and *gubernaculum*, which is the use of the general rule-making power.<sup>93</sup> As Krygier put it in his commentary on Palombella's work, 'the king was subject to the law that he had not made, indeed that made him king. For the king - for anyone - to ignore or override that law was to violate the rule of law'.<sup>94</sup> Even in the contemporary age of popular sovereignty, this statement is obviously true, since democracy should not be capable of annihilating the law. Indeed, this is one of the key points made by the defenders of judicial review.<sup>95</sup>

Unlike despotic or totalitarian regimes, where the ruler is free to do anything he pleases, or problematic EU Member States such as Hungary, where the constitution is a political tool, or Poland, where the executive ignores the constitution to undermine the separation of powers, or pre-constitutional democracies, which equate the law with legislation,<sup>96</sup> the majority of constitutional democracies in the world today recognise the distinction between *jurisdictio* and *gubernaculum*, thus achieving a sound approximation of Palombella's rule of law as an institutional ideal, in terms of maintaining and fostering the constant tension between these two facets of the law. The authority should be itself bound by clear legal norms which are outside of its control. Indeed, this is the key feature of post-war constitutionalism. The *jurisdictio-gubernaculum* distinction, lying at the core of what the rule of law is about, can be policed either by courts or even by the structure of the constitution itself through removing certain domains from *gubernaculum*'s scope.<sup>97</sup> The ideology of human rights is of

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<sup>89</sup> One should not forget the wise words of Joseph Raz: 'We have no need to be converted into the rule of law just in order to believe ... that good should triumph': J. Raz, 'The Rule of Law and Its Virtue', in J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 210.

<sup>90</sup> G. Palombella (2015) 'Beyond Legality - Before Democracy', *op. cit.*

<sup>91</sup> J.P. Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and the Eighteenth Centuries* (DeKalb: Northern Illinois University Press, 2004).

<sup>92</sup> G. Palombella (2012) *Legalità globale?*, *op. cit.*

<sup>93</sup> For a detailed exposé, see G. Palombella (2015) 'Beyond Legality - Before Democracy', *op. cit.* See also G. Palombella, 'The Rule of Law and its Core', in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009) 17, at 30, emphasising that this duality should not be disturbed by democratic outcomes and ethical choices.

<sup>94</sup> M. Krygier, 'Inside the Rule of Law' (2014) 3 *Rivista di filosofia del diritto* 77, 84.

<sup>95</sup> Cf. M. Kumm, 'The Idea of Socratic Contestation', *op. cit.*

<sup>96</sup> In a pre-constitutional state, the *Rechtsstaat* shapes a reality, in the words of Gianfranco Poggi, where 'there is a relation of near-identity between the state and its law': G. Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford: Stanford University Press, 1978) 238 (as cited in M. Krygier, 'Inside the Rule of Law', *op. cit.*, at 84).

<sup>97</sup> Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, (Oxford: Oxford University Press, 2017) 179-196.

huge significance in this context.<sup>98</sup> Furthermore, the existence of international law and, <sup>99</sup> of course, supranational legal orders,<sup>100</sup> definitely contributes to the policing of the aforementioned duality.<sup>101</sup> The policing of the *jurisdictio-gubernaculum* divide is thus possible both through the means internal and external to the given legal system.

## 4. Supranational law and the instrumentalisation of values

From Lord Mackenzie Stuart<sup>102</sup> to *Les Verts*, which characterises the Treaties as ‘a constitutional charter based on the rule of law’,<sup>103</sup> what we have been hearing about on the subject of the rule of law in the EU actually amounts to compliance with own law.<sup>104</sup> This is an established understanding of legality.<sup>105</sup> Legality is not enough to ensure that the EU behaves like - and is - a true rule of law-based constitutional system. Should one submit that equating the rule of law and legality is a legitimate move, then, as Palombella correctly notes, our thinking ‘shifts the issue from the rule of law to the [...] respect for the laws of a legal system’.<sup>106</sup> Yet ‘the rule of law cannot mean just the self-referentiality of a legal order’,<sup>107</sup> which is the reason why contemporary constitutionalism is usually understood as

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<sup>98</sup> G. Frankenberg, ‘Human Rights and the Belief in a Just World’ (2013) 12 I-CON 35.

<sup>99</sup> R. Dworkin, ‘A New Philosophy of International Law’ (2013) 41 Philosophy and Public Affairs 2.

<sup>100</sup> For an argument that numerous Central and Eastern European states were actually motivated by the desire for external legal checks on their laws - a *jurisdictio* - when joining the Council of Europe, see, W. Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford: Oxford University Press, 2012).

<sup>101</sup> Palombella (2012) *Legalità globale?*, *op. cit.*, ch. 2.

<sup>102</sup> Lord Mackenzie Stuart, *The European Communities and the Rule of Law* (London: Stevens and Sons, 1977). See also G. Bebr, *Rule of Law within the European Communities* (Brussels: Institut d’Etudes Européennes de l’Université Libre de Bruxelles, 1965).

<sup>103</sup> Case 294/83 *Partie Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339, 23. See also Opinion 1/91 EEA Agreement [1991] ECR 6097.

<sup>104</sup> M.L. Fernandez Esteban, *The Rule of Law in the European Constitution* (The Hague: Kluwer Law International, 1999); also, U. Everling, ‘The European Union as a Federal Association of States and Citizens’, in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd ed.) (Oxford/Munich: Hart Publishing/CH Beck, 2010) 701; M. Zuleeg, ‘The Advantages of the European Constitution’, in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd edn) (Oxford/Munich: Hart Publishing/CH Beck, 2010) 763, 772-779. EU institutions’ own accounts of what is meant by the rule of law beyond the tautology of ‘being bound by law’ present a most diverse account, which found an expression in the EU’s external action: L. Pech, ‘Promoting the Rule of Law Abroad’, in D. Kochenov and F. Amtenbrink (eds), *The European Union’s Shaping of the International Legal Order* (Cambridge: Cambridge University Press, 2013) 108.

<sup>105</sup> E.g. the contributions in L.F.M. Besselink, F. Pennings and S. Prechal (eds), *The Eclipse of Legality in the European Union* (The Hague: Kluwer, 2010).

<sup>106</sup> G. Palombella (2015) ‘Beyond Legality - Before Democracy’, *op. cit.*

<sup>107</sup> Id. Compare with M. Krygier: ‘To try to capture this elusive phenomenon by focusing on characteristics of laws and legal institutions is, I believe, to start in the wrong place and move in the wrong direction’: M. Krygier, ‘The Rule of Law. An Abuser’s Guide’, in A. Sajó (ed), *The Dark Side of Fundamental Rights* (Utrecht: Eleven, 2006) 129. See also B. Tamanaha, *Law and Means to an End* (Cambridge: Cambridge University Press, 2006).

implying, among other things, additional restraints through law:<sup>108</sup> restraints which are, crucially, not simply democratic or political.<sup>109</sup>

By and large, the rearticulation of the Union from an ordinary treaty organisation into a constitutional system was not accompanied by a sufficient upgrade of the role played by the core values it is said to build upon.<sup>110</sup> These values do not inform the day-to-day functioning of EU law, neither internally<sup>111</sup> nor externally.<sup>112</sup> Let us not forget that the promotion of its values, including the rule of law, is an obligation lying on the Union in accordance with the Treaties.<sup>113</sup> Indeed, unless we take the Commission's scribbles for granted, the EU's steering of countless issues directly related to the values at hand is more problematic than not. The EU is not about the values Article 2 TEU preaches, which any student of EU law and politics will readily confirm.<sup>114</sup> The EU's very self-definition is not about human rights, the rule of law or democracy.<sup>115</sup> EU law functions differently: there is a whole other set of principles that actually matter and are held dear: supremacy, direct effect, and autonomy are the key trio coming to mind.<sup>116</sup> Operating together, they can set aside both national constitutional<sup>117</sup>

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<sup>108</sup> For a clear discussion of the relationship between constitutionalism and the rule of law, see, M. Krygier, 'Tempering Power: Realist-idealism, Constitutionalism, and the Rule of Law', in M. Adams et al. (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge: Cambridge University Press, 2017) 34-59.

<sup>109</sup> Naturally, this is not to say that we should do away with the political restraints. Indeed, the virtually complete depoliticisation of the law has been one of the key criticisms of the EU legal order: J. Přibáň, 'The Evolving Idea of Political Justice in the EU: From Substantive Deficits to the Systemic Contingency of European Society', in D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2015) 193 and M.A. Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries', in D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit? op. cit.*.

<sup>110</sup> A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 *Oxford Journal of Legal Studies* 549.

<sup>111</sup> J.H.H. Weiler, 'Europa: "Nous coalisons des Etats nous n'unissons pas des hommes"', in M. Cartabia and A. Simoncini (eds), *La sostenibilità della democrazia nel XXI secolo* (Bologna: Il Mulino, 2009) 51; A. Williams, *The Ethos of Europe: Values, Law, and Justice in the EU* (Cambridge: Cambridge University Press, 2012).

<sup>112</sup> For critical engagements, see, M. Cremona, 'Values in EU Foreign Policy', in M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing, 2011), 275; P. Leino and R. Petrov, 'Between "Common Values" and Competing Universals' (2009) 15 *European Law Journal* 654.

<sup>113</sup> Art. 3(5) TEU.

<sup>114</sup> The crucial argument in this vein has been made, most powerfully, by Andrew Williams: A. Williams, 'Taking Values Seriously', *op. cit.* See, also, J.H.H. Weiler's unpublished paper 'Europe Against Itself: On the Distinction between Values and Virtues (and Vices) in the Construction and Development of European Integration' (2010) *Integration Paper for the International Legal Theory Colloquium*.

<sup>115</sup> See, most recently, Opinion 2/13 (ECHR Accession II) [2014] ECLI:EU:C:2014:2454, para. 170, which states that the fundamental right in the EU are 'interpret[ed] [...] within the framework of the structure and objectives of the EU'.

<sup>116</sup> Procedural principles cannot possibly replace the lack of substantive attention to the core values encompassed by Art. 2 TEU, including the Rule of Law, threatening to cause justice deficit of the Union: D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2015). Cf., D. Halberstam, "'It's the Autonomy, Stupid!'" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105; and P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue - Autonomy or Autarky?', *Fordham International Law Journal*, 38 (2015), 955; D. Kochenov, 'Citizenship without Respect' (2010) *Jean Monnet Working Paper* (NYU Law School) No. 08/10.

<sup>117</sup> Case C-399/11, Melloni [2013] 107.



and international human rights,<sup>118</sup> as well as UN law constraints.<sup>119</sup> In the current crisis-rich environment,<sup>120</sup> the Union frequently stars as part of the problem, rather than part of the solution. The problem is, it behaves like a constitutional system endowed with authority relying on the ECJ to police this claim – a natural expectation of any legal order<sup>121</sup> – while failing, at the same time, to boast the necessary ABC of constitutionalism: when push comes to shove, its values play a foundational role in outlining neither the scope nor the substance of the law.<sup>122</sup>

Bringing the values back in is indispensable in order to infuse the EU's constitutional claims with credibility. In practice, this would mean a return to the promise of EU integration made in the days of the Union's inception.<sup>123</sup> *A fédération européenne* (the one mentioned in the Schuman Declaration) to be brought about via the creation of the internal market, stood for a line of developments significantly more far-reaching than the idea of economic integration as such. The former is value-based – while the latter is probably not (at least, not based on the values of Article 2), as Andrew Williams explained in his seminal work.<sup>124</sup>

Not the whole story was negative, though. Although, the Union's ambition has gradually been scaled down to the market – call it a hijacking of the ends by the means<sup>125</sup> – the Union started *de facto* playing, mostly through negative integration, the role of the promoter of liberal and tolerant nationhood, as rightly characterised by Kymlicka – advancing a very clear idea of constitutionalism based on proportionality, tolerance, and the taming of nationalism.<sup>126</sup> Besides, at the core of the Union there lay basic mutual respect among the Member States: the Union would be impossible should they obstruct the principle of mutual recognition.<sup>127</sup>

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<sup>118</sup> Opinion 2/13 (ECHR Accession II) [2014] ECLI:EU:C:2014:2454; Kochenov 'EU Law without the Rule of Law'.

<sup>119</sup> On the Kadi saga, see, G. de Búrca, 'The European Court of Justice and the International Legal Order after Kadi', *Harvard International Law Journal*, 51 (2010), 1. See also, of course, C-584/10 Kadi II [2013] ECLI:EU:C:2013:518.

<sup>120</sup> Three equally important facets of the current crisis can be outlined: values; justice; and economic and monetary. On the crisis of values, see e.g., Williams, 'Taking Values Seriously' and Weiler, 'On the Distinction'. On the crisis of justice: Kochenov, de Búrca and Williams (eds), *Europe's Justice Deficit*. On the economic side of the crisis, see e.g., A. Menéndez, 'The Existential Crisis of the European Union', *German Law Journal*, 14 (2013), 453; M. Adams, F. Fabbrini and P. Larouche (eds), *The Constitutionalisation of European Budgetary Constraints* (Oxford: Hart Publishing, 2014).

<sup>121</sup> J. Lindeboom, 'Why EU Law Claims Supremacy', 38 *Oxford Journal of Legal Studies*, 2018, 328.

<sup>122</sup> G. Peebles, "'A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law', *Law and Social Inquiry*, 22 (1998), 581; D. Kochenov, 'On Tiles and Pillars', in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 3.

<sup>123</sup> On the key aspects of dynamics of EU's legal history see, B. Davies and M. Rasmussen, 'Towards a New History of European Law', *Contemporary European History*, 21 (2012), 305.

<sup>124</sup> Williams, *The Ethos of Europe*, *op. cit.*

<sup>125</sup> D. Kochenov, 'The Citizenship Paradigm', *Cambridge Yearbook of European Legal Studies*, 15 (2013), 196.

<sup>126</sup> W. Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice', in S. Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2006), p. 134. See also G. Davies, 'Humiliation of the State as a Constitutional Tactic', in F. Amtenbrink and P. van den Bergh (eds), *The Constitutional Integrity of the European Union* (The Hague: T.M.C. Asser Press, 2010).

<sup>127</sup> M. Poiares Maduro, 'So Close Yet So Far: The Paradoxes of Mutual Recognition', *Journal of European Public Policy*, 14 (2007). For a very sophisticated analysis of the Union's effects on the Member States see A. Somek, 'The Argument from Transnational Effects I', *European Law Journal*, 16 (2010), 315 and A. Somek, 'The Argument from Transnational Effects II', *European Law Journal*, 16 (2010), 375.

This came down to frowning upon the ideology of ‘thick’ national identities, however glorified in some schoolbooks. The ultimate result is that the EU, sub-consciously as it were, emerged as a promoter of *one* particular type of constitutionalism,<sup>128</sup> which is based on the rule of law understood through national democracy and the culture of justification implying human rights protection and strong judicial review. To be a Member State of the EU in the context of these developments came to signify one thing: to stick to this particular type of constitutionalism, which is now reflected in Article 2 TEU and which also represents the most important condition to be fulfilled before joining the EU, as hinted at in Article 49 TEU.<sup>129</sup>

The EU thus emerged as a vehicle of the negative market-based approach to the ‘values’ question. Clearly, creating a market and questioning the state is not sufficient as a basis for a mature constitutional system, potentially creating a justice nugatory at the supranational level<sup>130</sup> – and perpetuating the Union’s inability to help the Member States labouring hard to inflict a justice void on themselves, either through an outright embrace of Putin-style ‘illiberal democracy’, recently proclaimed as an ideal to strive for by the Hungarian Prime Minister Orbán,<sup>131</sup> an attack on the judiciary and the media, as in contemporary Poland,<sup>132</sup> or through failing to build a well-ordered and functioning modern state, as it the case in Greece<sup>133</sup> and Romania,<sup>134</sup> for instance. Outright defiance is thus not required to fall out of adherence to Article 2 TEU aspirations.

## 5. Supranational powerlessness as an element of Member State-level Belarusisation

The Union is thus generally powerless concerning the *enforcement* of values and, more importantly, is also indecisive as to their *content*. The very fact that we are now concerned with enforcing them seriously amounts to nothing else but a concession that the presumption that there is a level playing field amongst all Member States in terms of the rule of law etc. – i.e. the fact that all of them actually adhere to the specific type of constitutionalism the EU set out to promote – does not hold (any more). This is something the European Court of Human Rights has already clearly hinted at in *M.S.S. v. Belgium and Greece*.<sup>135</sup> Acknowledging this alongside the EU’s obvious powerlessness as far as values are concerned is a potentially explosive combination in the Union built on Member State equality and the principle of mutual recognition. In a situation where the core values are not respected by

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<sup>128</sup> V. Perju, ‘Proportionality and Freedom – An Essay on Method in Constitutional Law’, *Global Constitutionalism*, 1 (2012), 334.

<sup>129</sup> See e.g., D. Kochenov, *EU Enlargement and the Failure*, ch. 2.

<sup>130</sup> S. Douglas-Scott, ‘Justice, Injustice and the Rule of Law in the EU’, in Kochenov, de Búrca and Williams (eds), *Europe’s Justice Deficit?*, p. 51.

<sup>131</sup> For the full text of the speech, see, The Budapest Beacon, 27 July 2014, <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592>.

<sup>132</sup> Cf. Venice Commission, Report of 11 March 2016.

<sup>133</sup> M. Ioannidis, ‘The Greek Case’, in Jakab and Kochenov (eds), *The Enforcement of EU Law*, *op. cit.*

<sup>134</sup> V. Perju, ‘The Romanian Double Executive’, 246.

<sup>135</sup> *MSS v. Belgium and Greece* [2011] Application No. 30696/09.

Hungary, for instance, we are not dealing with a Member State that is revolting for one reason or another against a binding norm of European law. At the level of values, we are dealing with a *principally different Member State*, with the Belarusisation of the EU from the inside.<sup>136</sup>

Once the values of Article 2 EU are not observed, the essential presumptions behind the core of the Union do not hold any more, undermining the very essence of the integration exercise: mutual recognition becomes an untenable fiction, which the Member States are nevertheless bound by EU law to adhere to. This is the core of what the autonomy of EU law stands for, as confirmed by the Court in the infamous Opinion 2/13 vetoing EU accession to the ECHR.<sup>137</sup> In this Opinion on the draft accession agreement of the EU to ECHR, the Court of Justice highlighted the principle of mutual trust between Member States, which forms the cornerstone of the area of freedom, security and justice. In the Court of Justice's interpretation, this means that a Member State shall presume all other Member States to be in compliance with EU law, including the respect for fundamental rights. To be fair, it should be mentioned that the Court also referred to so-called 'exceptional circumstances', which would warrant deviations from the mutual trust principle,<sup>138</sup> but the exact nature of these exceptional circumstances was left open.<sup>139</sup> So as a general rule, the Court insists that autonomy considerations in the context of EU law are usually prone to prevail over human rights and other values - including the rule of law - cherished in the national constitutional systems of the Member States. Indeed, it would probably not be incorrect to argue that this would be the shortest possible summary of Opinion 2/13, which summarised EU law as it stands. The consequences for the rule of law are drastic: all the principles invoked by the ECJ to justify giving EU law the upper hand in Opinion 2/13 are procedural, while the problems that the reliance on the ECHR is there to solve are substantive. Curing substantive deficiencies of the EU legal order with the remedies confined to autonomy and direct effect is a logical flaw plaguing the EU legal system, which puzzles the most renowned commentators.<sup>140</sup> One cannot quarrel about the roses when the forests are burning. To agree with Eleanor Sharpston and Daniel Sarmiento, 'in the balance between individual rights and primacy, the Court in Opinion 2/13 has fairly clearly sided with the latter. The losers under Opinion 2/13 are not the Member State of the signatory States of the Council of Europe, but the individual citizens of the European Union'.<sup>141</sup> This is so, one must add, not only because of the potential reduction of the level of human rights protection. Rather, it is due to the fact that the EU, as Opinion 2/13 made clear, boasts an overwhelming potential to

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<sup>136</sup> U. Belavusau, 'Case C-286/12 Commission v. Hungary', *Common Market Law Review*, 50 (2013), 1145.

<sup>137</sup> This point has been forcefully restated in the ECJ's Opinion 2/13 (ECHR Accession II) [2014] ECLI:EU:C:2014:2454. See, e.g., para. 192.

<sup>138</sup> *Id.*

<sup>139</sup> In *Aranyosi and Căldăraru*, the Court of Justice had an opportunity to clarify what those exceptional circumstances might be and it made an attempt to do so, but ultimately opened more questions than it answered: see Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198. For an analysis see W. Van Ballegooij, and P. Bárd, 'Mutual Recognition and Individual Rights: Did the Court get it Right?' (2016) 7 *New Journal of European Criminal Law* 439-464.

<sup>140</sup> E.g. P. Eeckhout, 'Opinion 2/13', *op. cit.*; D. Halberstam, 'It's the Autonomy', *op. cit.*

<sup>141</sup> E. Sharpston and D. Sarmiento, 'European Citizenship and its New Union: Time to Move on?', in D. Kochenov (ed), *EU Citizenship and Federalism*, *op. cit.*

undermine the rule of law at the national level and this potential impact is not an empty threat.<sup>142</sup>

## 6. Enforcement is not a panacea: as a conclusion

The core question which emerges in the light of the discussion above, is how to ensure that the EU's own approach to the rule of law does not undermine, if not destroy, adherence to the principle of the rule of law in the Member States, which are, in fact, compliant with the values listed in Article 2 TEU. We submit that such an understanding of the rule of law cannot possibly lead to the much-needed solution of the outstanding problems. Instead, the most mature answer to the problems should necessarily involve not only the reform of the enforcement mechanisms, but *the reform of the Union as such*, as the supranational law should be made more aware of the values it is obliged by the Treaties to respect and also, crucially, to aspire to protect at both the national and supranational levels. Instead of hiding behind the veil of the procedural purity banners of autonomy, supremacy and the like, EU law should embrace the rule of law as an institutional ideal.<sup>143</sup> This implies, *inter alia*, eventual substantive limitations on the *acquis* of the Union as well as taking Article 2 TEU values to heart in the context of the day-to-day functioning of the Union, elevating the values above the instrumentalism marking them today. The result would be an emergence of a supranational constitutional system at the EU level, which would be truer to the glorious 'constitutional' label, and which would play a significantly more productive role in solving the backsliding challenges in Hungary and Poland, where the war against all what we believe in is currently on-going.

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<sup>142</sup> See, further, D. Kochenov 'Is There EU Rule of Law?', *op. cit.*

<sup>143</sup> Cf. G. Palombella, È possibile la legalità globale?, *op. cit.*





RECONNECT is a four-year multidisciplinary research project on ‘Reconciling Europe with its Citizens through Democracy and the Rule of Law’, aimed at understanding and providing solutions to the recent challenges faced by the European Union (EU). With an explicit focus on strengthening the EU’s legitimacy through democracy and the rule of law, RECONNECT seeks to build a new narrative for Europe, enabling the EU to become more attuned to the expectations of its citizens. Bringing together 18 academic partner institutions from 14 countries, RECONNECT focuses on key policy areas: economic and monetary governance, counter-terrorism, international trade and migration.



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